SUPREME COURT, U.S.
FILED
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JAMES R. BROWNING, Clerk

No. 334

In the Supreme Court of the United States

OCTOBER TERM, 1958

SCIENTIFIC LIVING, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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3 Freeman, *Judgments*, § 1294 (5th ed. 1925) — 7

7 Moore's Federal Practice (2d ed.) — 9

483691—58

QUESTION PRESENTED

Whether the court below correctly upheld a district court order fining petitioner $3,000 for civil contempt.

STATUTE INVOLVED

Section 9 of the Federal Trade Commission Act, 38 Stat. 722, 15 U. S. C. 49, provides in pertinent part as follows:

> That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.
>
> Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.
>
> Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy

or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered; or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

* * * * *

STATEMENT

Petitioner seeks review of a judgment of the Court of Appeals for the Third Circuit affirming a district court order fining petitioner $3,000 for civil contempt because of petitioner's refusal to comply with a subpoena *duces tecum*.

On September 25, 1953, the Federal Trade Commission issued an order directing petitioner, a corporation which sells and distributes in interstate commerce health foods and a cooking utensil, to cease and desist from making certain misrepresentations as to the curative and health properties of its products. During a subsequent investigation to determine whether petitioner was complying with the order, the Commission issued a subpoena *duces tecum* requiring the production of designated documents. Petitioner refused to comply with the subpoena, and on April 17, 1957, the District Court for the Middle District of Pennsylvania, on motion of the Commission, issued an order enforcing the subpoena (App. 6b).[1] Petitioner appealed from this order to the Court of Appeals for the Third Circuit, and the District Court stayed fur-

[1] "App." refers to the appendix to the Commission's brief in the Court of Appeals.

ther proceedings "until [petitioner] has had an opportunity to complete its appeal," and provided that "[a] time and place for compliance will be fixed when the appeal in the matter herein involved has been disposed of" (App. 6b).

On August 12, 1957, the Court of Appeals dismissed petitioner's appeal for want of timely prosecution, and two days later, the District Court received the mandate of the Court of Appeals (App. 2b). On September 25, 1957, the District Court fixed a new date (October 8, 1957) for compliance with the subpoena (App. 7b). The documents were not produced on that date, and the court then directed petitioner to appear and show cause why it should not be held in contempt for failing to comply with the court's order. After a hearing, the District Court, on October 22, 1957, adjudged petitioner in civil contempt and fined it $3,000 "to be effective on October 28, 1957, in the event that said corporation fails to comply before" that date with the production order.[3] When petitioner again failed to comply, the court on October 29, 1957, entered judgment for $3,000 (App. 8b–9b).

---

[2] On August 19, 1957, the Court of Appeals denied a motion to vacate the order dismissing the appeal; and on October 7, 1957, it denied a motion to recall and stay its mandate. On February 3, 1958, this Court denied a petition for certiorari seeking review of the Court of Appeals' dismissal of the appeal. 355 U. S. 940.

[3] At the same hearing, the court held the corporation's secretary, Basalyga, and its vice-president, Mildred Hohensee, in civil contempt (Transcript of Hearing, October 22, 1957, pp. 37–38). Basalyga was committed at once (*id.*, p. 38), and Mrs. Hohensee on December 17, 1957 (Pet. 2). Both were released on January 9, 1958 (Pet. 14).

On May 6, 1958, the Court of Appeals unanimously affirmed (Pet. Ex. A). In a brief *per curiam* opinion, it stated (*ibid.*) that "Upon consideration of the record we are of the opinion that the instant appeal is without merit."

ARGUMENT

Although petitioner makes numerous unsupported charges of misconduct by Government officials (see, *e. g.*, Pet. 3, 5–6, 15–20, Ex. Q), these contentions are irrelevant to the narrow issue here presented: whether the Court of Appeals correctly affirmed petitioner's $3,000 fine for civil contempt.[1] We submit that the decision of the Court of Appeals on that issue was clearly correct, and that the petition presents no question warranting further review by this Court.

1. Petitioner contends (Pet. 11–12) that the District Court's order of October 29, 1957, was "'void" because it imposed a "flat" fine which, it contends, cannot be imposed for civil contempt because it is "non-coercive." But the October 29 order must be considered in connection with the prior order of October 22 and, when thus viewed, it clearly was coercive. The October 22 order adjudged petitioner in civil contempt and fined it $3,000, "to be effective on October 28, 1957, in the event that said corporation fails to comply before said date with this Court's Order" en-

[1] Two of petitioner's officers were also held in civil contempt (see note 3, *supra*). They were not parties to the appeal below, and are not petitioners. Petitioner's contentions that their rights were violated (*e. g.*, Pet. 3, 6, 15–20) are, therefore, not material to the issue which petitioner presents. Cf. *Tileston* v. *Ullman*, 318 U. S. 44.

forcing the subpoena. The October 29 order, after reciting that the documents had not been produced, merely directed the clerk to enter judgment against petitioner for $3,000.

"One who is fined, unless by a day certain he produces the books, has it in his power to avoid any penalty," and the fine is a "coercive sanction * * * to compel the contemnor to do what the law made it his duty to do." *Penfield Co.* v. *Securities & Exchange Commission*, 330 U. S. 585, 590. The procedure followed by the District Court in this case is identical with that adopted by this Court in *United States* v. *United Mine Workers*, 330 U. S. 258. There this Court, in modifying the District Court's single fine for both criminal and civil contempt, imposed a fine of $700,000 for criminal contempt, and an additional fine of $2,800,000 unless the union should show within five days that it had fully complied with the court order which it had violated (p. 305). The Court pointed out (p. 307) that the latter fine was "a coercive imposition upon the defendant union to compel obedience with the court's outstanding order." See also *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 441–444; *Fox* v. *Capital Co.*, 299 U. S. 105; *McComb* v. *Jacksonville Paper Co.*, 336 U. S. 187.[5]

[5] The other cases cited by petitioner (Pet. 12) are beside the point. *In re Bradley*, 318 U. S. 50, involved punishment on a criminal contempt charge of intimidating a witness. Although *Nilva* v. *United States*, 352 U. S. 385, holds only that failure to produce subpoenaed records is punishable as a criminal contempt, the decision does not deny that it might also constitute a civil contempt. *Doyle* v. *London Guarantee and Accident Co.*, 204 U. S. 599, held only that a civil contempt order during the progress of a case is interlocutory and not immediately reviewable.

Also without substance is the contention (Pet. 11) that the fine is void because the October 29 order was entered without notice or hearing. The previous order of October 22, 1957, which imposed the fine but conditioned it upon the non-production of the subpoenaed documents, was entered after full hearing. The October 29 order merely recited the undisputed fact that the documents were not produced, and directed entry of judgment against petitioner for $3,000. It no more required notice and hearing than the entry of a default judgment upon motion of the plaintiff after the non-appearance of the defendant. 3 Freeman, *Judgments*, § 1291 (5th ed. 1925), and cases there cited.

Petitioner's contention (Pet. 8–11, 14–15) that the evidence does not support its being held in contempt is frivolous. Between September 25, 1957, when petitioner was ordered to produce the documents, and October 28, 1957, when the fine became effective, petitioner had more than a month in which to comply with the order or to offer some reasonable explanation why the documents were not forthcoming. Since petitioner and its officers refused to comply, and since, at the hearing on October 22, 1957, they gave no satisfactory reason for not producing the documents, the District Court was fully justified in taking decisive measures to compel obedience, by imposing the $3,000 fine to become effective six days later if petitioner had not by that date produced the documents.

Petitioner also complains that it was without counsel at the October 22, 1957 hearing (Pet. 4–8). One of petitioner's counsel had withdrawn "several weeks ago" and had so informed petitioner at the time (Transcript of Hearing, October 22, 1957, p. 14); another

attorney (who had appeared only to request a continuance of the enforcement proceedings, *id.*, 2–4), was permitted to withdraw from the case without objection from petitioner (*id.*, p. 4). Although petitioner unsuccessfully sought an attorney before the present proceedings (*id.*, p. 14), petitioner did not request additional time to seek new counsel, but instead came prepared for the hearing. Both the vice-president and the secretary personally drafted and filed lengthy motions challenging on several grounds the jurisdiction of the court to proceed with the case (*id.*, pp. 25–26, 27–28). The District Court was, therefore, fully justified in not staying, on its own motion, proceedings which had been already unnecessarily protracted by petitioner's dilatory tactics.[6]

2. Petitioner further contends that the District Court lost jurisdiction to enter the contempt orders when it issued a stay on April 29, 1957, in connection with the prior appeal in this case (Pet. 12–13). That order suspended further proceedings "until [petitioner] has had an opportunity to complete its appeal," and ordered the case resumed "when the appeal in the matter herein involved has been disposed of" (App. 6b). When the Court of Appeals dismissed the appeal on August 22, 1957, the appeal was "complete," and the mandate which was received two days later authorized the District Court to go forward with the case. Since the stay order was limited to the period of the "appeal," and since the mandate of the Court

[6] Petitioner also alleges bias on the part of the trial judge (Pet. 8–11), but an examination of the transcript of the October 22, 1957 hearing shows that this contention, based chiefly on isolated excerpts from that transcript, is without substance.

of Appeals issued at the termination of the appeal to that court was not stayed,[7] the stay did not continue until expiration of the period during which a petition for a writ of certiorari could be filed. See *Powell* v. *Maryland Trust Co.*, 125 F. 2d 260, 273 (C. A. 4), certiorari denied, 316 U. S. 671; 7 Moore's Federal Practice, p. 1371 (2d ed.).[8]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1958.

[7] On September 30, 1957, petitioner moved to recall and stay the mandate pending this Court's action on the petition for certiorari, but the Court of Appeals denied the motion on October 7, 1957. On January 4, 1958, Mr. Justice Brennan denied a similar application.

[8] The cases cited on page 13 of the petition hold only that, once the appellate court acquires jurisdiction of the case, the District Court cannot vacate or modify the judgment appealed from, or the order staying execution of the judgment. In this case, however, the Court of Appeals had relinquished its jurisdiction when it issued its mandate to the District Court.

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SUPREME COURT OF THE UNITED STATES

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No. 334

SCIENTIFIC LIVING, INC.,

Petitioner

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR RECONSIDERATION OF PETITION FOR A WRIT OF CERTIORARI

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DECEMBER 3, 1958.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 334

SCIENTIFIC LIVING, INC.,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR RECONSIDERATION OF PETITION FOR A WRIT OF CERTIORARI

Now comes Scientific Living, Inc., the above named petitioner, and respectfully submits this Petition For Reconsideration Of Its Petition For A Writ Of Certiorari, directed to the Honorable, the Judges of the United States Court of Appeals for the Third Circuit pursuant to and in accordance with Rule 58 of the Rules of this Court and for cause thereof show:

1. That the time for filing this petition for reconsideration has been enlarged to the 4th day of December, 1958, by order of this court dated November 14, 1958.

2. This petition is made within the time allowed under order of this court dated November 14, 1958.

3. The court has overlooked, in its denial of certiorari, the provisions of the first Amendment to the Federal Constitution which provides for freedom of speech for all. In that

the desist order abridged the right of freedom of expression and speech guaranteed the petitioner under the First Amendment to the Federal Constitution.

4. That this court overlooked the constitutional guarantee embraced in the 6th Amendment to the Federal Constitution relative to the effective assistance of counsel since the trial court did not permit petitioner to have any counsel whatsoever.

5. That this court overlooked the due process of law clause of the 5th Amendment, since petitioner was denied the right to counsel.

6. That this court overlooked the fact that equal justice under law was denied petitioner since it was charged a fine in a civil contempt proceeding.

7. That this court overlooked the fact that petitioner was denied its right to a "day in court", the right to be heard on that particular order, entered on October 29, 1957. The order was entered without any notice or hearing.

Matters Incorrectly Represented in Respondent's Brief, to Which Time Did Not Permit Reply From Petitioner, Were Overlooked by the Court.

8. Respondent's statement (Pet. 8) (R. Brief 3, 7) asserts that petitioner refused to comply with a subpoena "duces tecum", whereas the record shows that petitioner never refused to comply with the said subpoena. It complied to the extent it was physically possible so to do. It went to great length to comply. It obtained from suppliers data requested in 5 of the 7 specifications laid in the said subpoena, and gave a reasonable explanation for not fully complying with same (R. 36).

9. This Court has been misled by respondent, in its Brief, where it stated to this Court that the U. S. Court of Appeals for the Third Circuit issued a "Mandate" (R. Brief 4, s. 9), which is contrary to fact. The fact is, the Court of Appeals

never issued a "Mandate" to the District Court, the Court of Appeals only transmitted to the District Court its *order dismissing the appeal*. The appeal from the desist order could not have been timely effectuated because, as contended by the government, petitioner was an "alter ego" corporation, and being such, its owner was incarcerated in the Federal Penitentiary during the period allowed for perfection of the appeal. Moreover, his incarceration restricted his privilege to such an extent that he was unable to discuss business matters with family, friend or counsel.

10. The foregoing order was entered without notice to petitioner and without affording it an opportunity to be heard on the question of compliance.

11. Respondent's argument (R. Brief 5), states:

> "* * * Although petitioner makes numerous unsupported charges of misconduct by government officials * * * these contentions are irrelevant to the narrow issue here presented. * * *"

The record supports these charges from beginning to end (Pet. Ex. "Q"), (Pet. for Recon. 11 to 15). The record is replete with unlawful overt acts of individuals acting under color of authority to unlawfully destroy petitioner and its business. The charges of misconduct are firmly rooted in the record, and are definitely relevant, material, substantial and a pertinent part of the instant case.

12. Respondent argues (R. Brief 6), that:

> "* * * one who is fined, unless by a day certain he produces the books, has it in his power to avoid any penalty, and the fine is a coercive sanction to compel the contemnor to do what the law made it his duty to do. * * *"

The difficulty with the above position of respondent is that it denies to petitioner the right of hearing to determine

whether he had complied with the coercive phase of the order, or to show excusable circumstances. Moreover, the coercive aspect of the order became ineffectual after October 28, 1957, under its own provisions. Respondent, on the one hand, treated the coercive condition as ending when it procured the $3,000.00 judgment. Yet, the record shows that petitioner was hailed back into court on several occasions thereafter, on October 29, 1957 and January 9, 1958. There was nothing coercive about the imposition of a $3,000.00 fine. In fact, the entry of the $3,000.00 judgment constituted a final and appealable judgment, as vesting continuing jurisdiction in the District Court. This is evidenced by the hearings referred to above between October 29, 1957, and January 9, 1958. If, as the action of respondent demonstrated, the respondent considered the $3,000.00 fine coercive, this fine ceased to operate as a judgment when the requisitioned specifications were produced and the nominal officers of petitioner were released and purged of contempt (Pet. 14). If this be not true, then it is apparent that petitioner never possessed the "key" to its involvement, and without the "key of erication" there is no coercive sanction. It is interesting to note that respondent's brief fails to discuss this question in any respect, and should thus be accepted by this court as an undisputed fact and an admission.

13. Respondent's Brief (R. Brief 7), asserts that:

> "* * * The previous order of October 22, 1957, which imposed the fine but conditioned it upon non-production of the subpoenaed documents, was entered after a full hearing, * * *"

Nothing could be more contrary to the facts developed at said hearing. The record discloses that petitioner and its two nominal officers (officers in name only), after a *denial*

of counsel and a *denial of a continuance* were jailed by Judge Murphy, who by his own admission sat on the bench as a "Caesar" (Pet. 8, 9, 10).

14. Respondent's brief (R. Brief 7), states, that:

> "* * * The October order merely recited the undisputed facts that the documents were not produced and directed entry of judgment against petitioner for $3,000.00.
>
> It is no more required notice and hearing than the entry of a default judgment. 3 Freeman Judgments, Sec. 129 (5th Ed. 1925). * * * "

Respondent's argument above quoted is entirely unilateral. It erroneously states that the "facts" were undisputed. This is a "half-truth", since petitioner received no notice or hearing, it is understandable why the so-called "facts" "were undisputed", and are therefore, herein, severely challenged (Pet. 2, 3). Who knows what actual facts would have been developed, had petitioner been accorded the right to be heard on October 29, 1957. Moreover, "3 Freeman Judgments, Sec. 1291", cited above is no authority for the proposition of law here involved: Notice, as related to injunctions and judgments, is governed by Rules 55 and 65 of the Federal Rules of Civil Procedures, especially, since respondent insists that the proceedings in the trial court were for civil contempt. The above *rules guarantee petitioner the right to notice before any order or judgment* may be entered against it. *Respondent admits that it failed to give the required notice* and its only reason for not doing so is based upon Freeman on Judgment, a treatise compiled more than 13 years prior to the effective date of the Federal Rules of Civil Procedure (Resp. Brief 7, 8).

15. Respondent states (R. Brief 7) that petitioner's contention of the evidence being insufficient to its adjudication

of contempt, was frivolous. This charge of respondent is itself abortive, according to the record filed in this court. There is nothing frivolous about the said contention of petitioner (Pet. 4, 5, 6, 7). The evidence shows that petitioner did everything possible to comply with the said order of the District Court, even though there was a serious question as to the legality of the entire proceedings. The record further shows that the two nominal officers of petitioner exhausted their capacities. That the owner of the corporation was incarcerated and that he alone could possibly supply the two remaining specifications of the subpoena, unless as contended by petitioner (Pet. 2) that *respondent had*, sometime previously, *surreptitiously obtained said subpoenaed records and thereafter demanded the same, the impossible, from petitioner.* It is to be noted that *this charge* made by petitioner (Pet. 2), *was not refuted* or even mentioned in respondent's Brief, *it should therefore be regarded as a fact and as an admission.* Moreover, any unbiased judge would have realized that petitioner did its utmost to comply with the court orders, but not Judge Murphy, who warned that, like Caesar, he was going to cross the "Rubicon".

16. Respondent's Brief (R. Brief 7, 8) admits that petitioner was without counsel but claims, contrary to fact, that petitioner did not request additional time to seek new counsel but instead came prepared for the hearing. Nothing could be further from the truth. This is a gross misstatement of fact, an opportunity to obtain counsel was denied as disclosed by the record (Pet. 5) There could be no greater need for counsel than the circumstances detailed in the foregoing statement of respondent. Also, the fact that petitioner was not granted a continuance (requested or not) for the purpose of securing counsel, demonstrates, beyond question, the necessity for counsel. It was the duty of the trial Judge, under the circumstances and in the interest of justice, to have afforded every reasonable possible opportu-

nity to petitioner to obtain counsel. There had been no delays which should augur against the right of a fair trial and the right to counsel. Such guarantees are basic under the 5th and 6th Amendments. Moreover, the delays referred to by respondent (R. Brief 8), were materially occasioned by Judge Murphy, himself, he took over one year to render an opinion on a motion, at the original hearing.

17. Respondent's Brief (R. Brief 8) asserts, in the foot note, that:

> "* * * Petitioner also alleges bias on the part of the trial judge (Pet. 8-11), but an examination of the transcript of the October 22, 1957 hearing shows that this contention, based chiefly on isolated excerpts from that transcript, is without substance. * * *"

The record shows that both the words and the acts of Judge Murphy and respondent belie the above foot note assertion of respondent. To say that the District Court acted without bias, is to ignore the very language of the court. The following is only a part of the court's expression (Pet. 7):

> "* * * Now, they have a right to come to this court, and I want to say in all seriousness, this court is going to cross the Rubicon. * * *"

The above expression of the court is the type used by perhaps a trial judge who is about to impose a sentence, after a verdict of guilty. One might expect such pretrial expressions in a totalitarian court but not in a Federal Court where "equal justice under law" is supposed to be administered. The foregoing pretrial remarks of Judge Murphy is in the teeth of 28 U.S.C.A., Section 144. This statute provides in substance that the courts of the United States shall not only be impartial in controversies submitted to them, but shall give assurance that they are impartial. A cogent

construction of the said statute is expressed in the case of *Whitaker vs. McLean*, (1941) 118 F. 2d 596, 73 App. D. C. 259. In the instant case, Judge Murphy has gone to an extreme, in the unlawful and opposite direction to the law, clearly revealing that he was not only severely biased and prejudiced, but also demonstrates the obvious and unmistakeable fact of performing both the role of witness and advocate for the adversary, constituting, inter alia, an obstruction of justice.

Other Substantial Grounds in Support of Petition

18. It is indeed significant that this court be apprised of some additional substantial circumstances surrounding the judgment in question and the attitude of the trial judge relative thereto. As stated before, the government has continuously made reference to petitioner as the "alter ego" corporation of Adolph Hohensee. The record supports the fact that during the contempt proceedings Adolph Hohensee was incarcerated in a Federal Penitentiary. That notwithstanding his incarceration, the said Adolph Hohensee tried in vain to assist in the discovery of the subpoenaed records sought by respondent. He instituted proceedings in the District Court through his next friends for the purpose, inter alia, of complying with the rule to show cause order of the District Court, but the same trial judge refused to have him brought to court to testify in said proceedings. Moreover, the trial judge refused to have 30 of his witnesses testify. The trial judge was adequately informed by his next friends at said hearing that Adolph Hohensee, while incarcerated, was threatened by the authorities of the U.S. Penitentiary, Lewisburg, Pa., that if he did not dismiss all litigation of libel and conspiracy, then pending, in the U.S. District Court for the Middle District of Pa. and the Common Pleas Court for Allegheny County, Pa., that he would be denied parole. In consequence of same, Adolph Hohen-

see, refused to abide the said threats and he was denied parole. It further developed in the hearing before the trial judge, instituted by his next friends, that he would be made insane or killed if he persisted in his refusal to dismiss said litigation. Adolph H. Hohensee, nevertheless, refused to be intimidated and was promptly assaulted, severely battered and hospitalized, to such an extent that it was necessary to transfer him from the Federal Penitentiary at Lewisburg, Pa. to the U.S. Medical Center, Springfield, Mo. The trial judge having full knowledge of the foregoing circumstances, nevertheless, proceeded to adjudicate petitioner in contempt of court and proceeded to impose a flat $3,000.00 fine on petitioner. The affidavit of Ben G. Hohensee and Mildred Hohensee is a part of the Appendix hereto, in support of the above stated facts (Pet. Ex. "Q"), (Pet. for Recon. 11 to 15). There are additional related documents, such as contained in the Supreme Court of U. S., October Term 1957, No. 683, other documents in the U. S. Court of Appeals for the Third Circuit and the trial court, all of which this court may take judicial notice.

Inter Alia, This Court Has Overlooked the Following Substantial Items, Which in Themselves Are Decisive

19. *Items represented* as facts *by respondent* in its Brief, *which are* patently *contrary to fact:*

a. That there was a full hearing on the order entered on October 29, 1957, (Pet. 2), (Resp. Brief 7), (Pet. for Recon. 3).

b. That a mandate was issued by the U.S. Court of Appeals, (Resp. Brief 4, 8, 9); (Pet. for Recon. 2).

c. That there was no request for a continuance in order to obtain counsel, (Pet. 5), (Resp. Brief 8); (Pet. for Recon. 3).

d. That petitioner refused to comply with order of District Court entered October 29, 1957, (Pet. 8), (Resp. Brief 3, 7), (Pet. for Recon. 2).

20. *Items admitted by respondent* in its Brief:

a. That petitioner received no notice or hearing prior to the District Court order entered on October 29, 1957, (Pet. 2), (Resp. Brief 7).

b. That petitioner did not have counsel, (Pet. 3, 4), (Resp. Brief 8), (Pet. for Recon. 3).

21. *Items* which *respondent* in its Brief *did not refute*:

a. That respondent surreptitiously obtained and possessed subpoenaed records while demanding same from petitioner, (Pet. 2), (Pet. for Recon. 4).

b. The 28 grave charges against respondent, (Pet. 15, 16, 17, 18, 19).

c. That petitioner could not produce subpoenaed records since it did not possess them at the time it was decreed by the court to produce them, nor did it know of their whereabouts until it was informed by the court that respondent admitted possessing them. (Pet. 2), (Pet. Recon. 4).

d. That the action of respondent was nothing more than a "fishing expedition", (Pet. 3).

WHEREFORE, petitioner prays for a reconsideration, that the judgment of this Court heretofore entered on October 20, 1958, be vacated; that the judgment of the court below be vacated; or that the petition for certiorari be granted.

Respectfully submitted,

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DECEMBER 3, 1958.

APPENDIX

Supplemental Affidavit

On Saturday, November 9, 1957, Mildred Hohensee, wife of Adolphus Hohensee, and Ben Hohensee, brother of Adolphus Hohensee, attempted to visit Adolphus Hohensee at the Federal Prison at Lewisburg, Pa. but they were denied visitation for the first time. It is apparent that they were cut off from visitation because they, a few days previously, had reduced to affidavits the shocking and alarming incidents and facts which had befallen Adolphus Hohensee at the hands of the prison authorities and had filed the same in the U. S. District Court for the Middle District of Pa.

It was only as a result of a direct personal appeal by Ben Hohensee in Washington, D. C., to the Federal Bureau of Prisons of the Dept. of Justice, that Mildred and Ben Hohensee were again permitted to visit Adolphus Hohensee. They thus visited him on Sunday, November 17, 1957, from 1:00 P.M. to 4 P.M. Ben Hohensee, in his appeal to the said Federal Bureau of Prisons had requested that said visiting time on Sunday be not counted toward the 3 hour monthly limit and that said visit be granted without censorship and be private since it was being made in contemplation of the forthcoming hearing on Monday, November 18, 1957, in the said U. S. Court.

At the conclusion of the 3 hour visit, the guard who was in attendance throughout the visit had a conference, just outside the door, with two other prison officials, one of which was Caprella, after which they reentered the room and Caprella demanded the surrender of all said 10 pages of notations under the pretext that parole officer Baker must first read the same, explaining that said Baker was not on duty at that time. Consequently the facts of incriminating evidence contained in said notes remain in the hands of the prison officials and inside the prison walls.

Upon entering the Prison at 1:00 P.M. we were, to our surprise, escorted to the Prison hospital and brought to Adolphus Hohensee who was stretched out on a prison bed. There he lay in a wretched physical condition due to severe internal hemorrhages and other injuries sustained at the hands of the prison authorities.

Adolph revealed to Ben and Mildred that immediately prior to their last visit, on November 5, 1957, Warden Cox and Blackwell warned that if Adolph disclosed any of the mistreatment to which he had been subjected and should the same result in his appearance in Court of giving testimony it would be too bad for Adolph the day he returns to prison from Court.

Adolph told Ben and Mildred that on Thursday, October 24, 1957, he was ordered to a certain place, which he did immediately without hesitation. At this point he was not mistreated.

He was thereupon placed in a cell without blankets, containing cot and mattress only. This cell was very cold where he shivered all night causing paralysis on one side of his body, as a result of which he could not get up in the morning.

On Friday, October 25, at 6 A.M. he was ordered to stand at attention which he was physically unable to do due to said paralysis and so explained.

Later that morning about 10 A.M. Assoc. Warden Blackwell sent two guards to Adolph ordering him into his office. Adolph again explained his physical inability to do so. Thereupon the guards used defamatory language and mistreated him. They struck him with their fists, two times in his right eye and once in his left eye. They struck him with their fists and knee in his stomach until he collapsed, laying prostrate on the floor.

Thereupon they dragged him from where he lay, from one end of the prison to the other, to Assoc. Warden Blackwell's office. They brought him to rest on the floor, leaving him against an object. Then they subjected him to interrogation. Due to the battering he had just received he was scarcely able to breathe much less answer any questions. At this point Blackwell ordered Adolph to be taken down into the "hole". They took him by his wrists and dragged him down three flights of stone stairs, head first, on his back. At the foot of the first flight of stairs, his tormentors hesitated long enough to permit another official to kick him in the ankles inflicting additional excruciating pain. The right ankle is still discolored.

Then they subjected him to more torture by dragging him, in the same manner, head first, on his back, down the other two flights of stone stairs, and threw him into the "hole".

As they dragged him into the dungeon his back was struck against a 6 inch raised threshold at the entrance to the dungeon.

One of the guards told Blackwell that there were two places, one with a toilet and the other without. Blackwell ordered that Adolph be thrown into the cell without the commode. This "hole" contained no furniture. He was thrown on the floor. There were no sanitary facilities or water, except an oriental type of toilet consisting of a hole in the floor for elimination, covered over by a grate. There were no blankets in this "hole". They removed Adolph's shoes and socks leaving him dressed in one garment only, a coverall. Then they forced over his prostrate body cold, sickening and nauseating gases making Adolph feel as though he was being driven insane.

On the same day, Friday, October 25, at about 4 P.M. a doctor visited Adolph, checking his pulse and offering him sedatives.

Adolph was losing considerable blood from internal hemorrhages from the mouth, bowels and bladder. Consequently the floor was bloody and nothing was done about it and he was permitted to lay there in that condition.

Late Saturday night, October 26, a guard kicked in a blanket soiled with fecal matter, apparently too filthy for the guard to handle otherwise with his hands. Before Adolph could spread the filthy blanket on the floor it was necessary for him to first, with his fingers, push the eliminated matter through the grate covering the hole in the floor. There was no water to wash his hands.

In Adolph's dying condition he requested visitation with a Protestant chaplain. He was informed that there was none available. He then asked for a Priest, but was likewise informed that there was none available, and the same response followed regarding a Rabbi.

Early Sunday morning, October 27, Adolph was still laying on the filthy blanket when along came a guard and yanked the blanket out from under him with such a sudden jolt as to cause additional aggravation to an already help-

less prostrate individual enduring excruciating pain and near the point of death.

On Monday, October 28, Assoc. Warden Blackwell with another guard visited Adolph and told him to remove the blood and remove the fecal matter through the hole covered over by a grate (the oriental toilet) that he would then be removed out of the "segregation cell". Adolph was barely physically able to do so, which he did.

On Monday, October 28, Adolphus was taken to the dining room but was unable to eat due to his physical condition as herein previously described. When Adolph's fellow inmates saw the sight of him in the wretched condition that he was, the prison authorities sensed the spontaneous wave of resentment of the rest of the prisoners because of Adolph's mistreatment, having black swollen eyes and seeing that he was hardly able to move about and suffering excruciating pain, that said authorities immediately increased the number of guards in said dining room.

On November 12, Medical Technician Jacobs called to the attention of the prison physician that the fecal matter eliminated by Adolphus was covered with black (old) blood and red (fresh) blood, indicating old and new hemorrhages.

The prison doctor is considering giving Adolphus blood transfusions due to the loss of blood.

Prior to Adolphus's mistreatment in the Prison he never had a hemorrhage.

Adolphus's blood pressure has dropped to such an alarming low point that the doctor has ordered the taking of his blood pressure every ½ hour and now during intervals of every two hours.

No wheel chair or crutches are issued to any inmate unless specifically ordered.

On one occasion Adolph complained to Assoc. Warden Cox and Blackwell that he was being driven insane. Warden Cox stated that the sooner Adolph becomes insane, the better it will be.

Adolph has over 30 witnesses to substantiate the charges contained herein, some of which witnesses are already beginning to be intimidated by the prison officials.

Ben and Mildred, when they arrived at the prison on Sunday, November 17, with the "Answer In The Nature of a Response To Petition For Writ of Habeas Corpus for Removal and Motion for Relief", to discuss the same with Adolphus, the guard relieved Ben of the same during visitation with Adolph and did not return it until after said visit had terminated, so as to preclude its examination by Adolph.

Since it appears that said Court has denied Adolphus Hohensee the right to personally appear on Monday, Nov. 18, 1957, and testify regarding the facts of his mistreatment as outlined in the said affidavits and since said Court also denied the privilege of reducing Hohensee's testimony to deposition form, I, a Hohensee asked the Guard, who sat in attendance, seeing all and hearing all conversation, if it was permissible for Ben Hohensee to record notations with pencil on a memo pad. The guard said it was permissible. This memo taking was requested so that any possible errors might be prevented and that dates and facts might be made certain. The guard, however required that the memos be left with him, which was done.

Adolph is at present time a very sick man, confined to his bed by order of the prison doctor.

BEN G. HOHENSEE,
P. O. Box 910, Scranton, Pa.
MILDRED HOHENSEE,
P. O. Box 910, Scranton, Pa.

STATE OF PA.,
County of Lackawanna, ss:

Mildred Hohensee and Ben G. Hohensee, being duly sworn, depose and say that they are the within named individuals in the foregoing "Supplemental Affidavit", subscribed by them; that they have read the contents thereof, and that the statements made are true, so they verily believe.

BEN G. HOHENSEE
MILDRED HOHENSEE

Subscribed and Sworn to this 18th day of November, 1957.